Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-14

LOUISVILLE AND NASHVILLE RAILROAD COMPANY - - - - - - - Appellant,

versus

Z. D. ATKINS, ROBERT CLEMENT, and CAYCE PENTECOST, Commissioners composing the Tennessee Public Service Commission;
HONORABLE RAY BLANTON, Governor of the State of Tennessee;
HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;
HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;
ALICE T. STEELE, Trustee of Dickson County, Tennessee; and
DICKSON COUNTY, TENNESSEE - - Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee
Nashville Division

JURISDICTIONAL STATEMENT

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY - - - - - - - - - *Appellant,*

v.

Z. D. ATKINS, ROBERT CLEMENT, and CAYCE PENTECOST, Commissioners composing the Tennessee Public Service Commission;
HONORABLE RAY BLANTON, Governor of the State of Tennessee;
HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;
HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;
ALICE T. STEELE, Trustee of Dickson County, Tennessee; and
DICKSON COUNTY, TENNESSEE - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Middle District of Ten-

nessee, Nashville Division (three judges sitting), entered on March 12, 1975, as amended on April 21, 1975, denying injunctive relief against enforcement of a state statute relating to the assessment of properties and dismissing the case, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Middle District of Tennessee, Nashville Division, has not been officially reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought pursuant to 28 U.S.C. §§ 2201-2202 and pursuant to 28 U.S.C. § 2281 seeking an injunction restraining the action of state officials in the enforcement of a state statute prescribing equalization ratios to be applied in the assessment of railroad properties for ad valorem taxation in the State of Tennessee, the ground of challenge being that the said statute deprives Appellant of the equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States. The judgment of the District Court was entered on March 12, 1975, and amended on April 21, 1975. Notice of appeal was filed in the said District Court on May 9, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal

is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Georgia Railroad & Banking Co.* v. *Redwine, State Revenue Commissioner,* 342 U. S. 299 (1952); *Query* v. *United States,* 316 U. S. 486 (1942); *Herkness* v. *Irion, Commissioner of Conservation,* 278 U. S. 92 (1928).

STATUTES INVOLVED

Constitution of Tennessee, Article II, Sec. 28. The pertinent text is set forth in Appendix B hereto.

Tennessee Code Annotated §§ 67-601(4), (7) and (8); § 67-611; § 67-616. The pertinent texts are set forth in Appendix C hereto.

A copy of the judgment below, and of the amendment thereto, are appended hereto as Appendix D.

A copy of the Notice of Appeal in this case is appended hereto as Appendix E.

QUESTIONS PRESENTED

1. On the facts of the case, do sufficient relevant differences, having a fair and reasonable relation to the division of the ad valorem tax burden, exist to justify taxation of railroad property on the basis of a higher assessment ratio than is applied to industrial and commercial properties, as defined by the Tennessee statute, without depriving the railroad of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Do the Order and Opinion entered in this case sufficiently contain Findings of Fact to comply with Rule 52(a) of the Federal Rules of Civil Procedure?

3. Did the Court below err in concluding that the complaint of Appellant is a matter solely for legislative concern and that for the Court to grant the relief requested "would take the Court outside the confines of judicial review," causing it to substitute its judgment for that of the Tennessee General Assembly?

STATEMENT OF THE CASE

Subsequent to court decisions finding that disproportionate taxation of the properties of railroads violated the Tennessee constitutional requirement of uniformity, the Tennessee Constitution was amended to establish four classes of property for ad valorem taxation purposes, i.e., public utility (to be equalized at 55% of value of real and personal property), commercial and industrial (to be equalized at 40% of value of real property and at 30% of value of personal property), residential (to be equalized at 25% of value of real property and 5% of value of personal property) and farm (to be equalized at the same ratios as residential property). (Appendix B). The Tennessee General Assembly then enacted legislation in implementation of the constitutional amendment, placing railroads in the classification of public utility property (Appendix C). Appellant duly challenged classification of its property as public utility property, the challenge was rejected by the assessing body, and

Appellant instituted this litigation, contending that the actions of the Tennessee General Assembly in classifying railroads as public utilities for property tax purposes and of the assessing bodies in assessing Appellant's properties within that category, rather than their being included within the classification of industrial and commercial property, were arbitrary and unreasonable and a denial to Appellant of that equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Evidence in the case demonstrates that conditions which formerly were held to justify separate property tax treatment of railroads no longer exist; that there are no such special conditions today; and that it is, therefore, arbitrary and unreasonable to classify railroads for that purpose separately from other non-public utility commercial and industrial property.

The record below[1] discloses many changes in the situation of railroads in the past 45 to 50 years. It shows, for example, that in 1929, 75% of all ton-miles of freight transported in the United States were carried by rail whereas by 1973, that percentage had dropped to less than 40% (I Tr. 11). It shows that in the days when discriminatory taxation of railroads was being upheld by the courts, the railroads had a virtual monopoly on intercity passenger traffic, but that rail

[1]There are three parts to the transcript: I, testimony taken in open court; II, Appellant's depositions; and III, Appellee's depositions. References are identified by reference to parts and page, *e.g.*, I Tr. 1. The prepared statement of Witness Frye was stipulated as his direct testimony. References thereto are in the following manner: "Frye, 1", meaning Frye statement, page 1.

passenger traffic has diminished from 34,000,000 passenger-miles in 1929 to 9,000,000 in 1973 (I Tr. 11).

Since 1945, the ton-miles generated by motor carriers in the United States have increased four times and the tonnage carried by water carriers has also increased four times but railroads' tonnage has dropped from 67.2% of the total to 38.2% of the total (II Tr. 90-91). This competition with which railroads are engaged is pervasive and reaches almost all commodities which could be carried by rail.

In Tennessee there are three major railroads and perhaps 20 smaller ones; they compete with approximately 2,000 truck lines and the competition extends into all parts of the State (III Tr. 140) . This is to be contrasted, in Tennessee, with fewer than 100 natural gas distribution companies, each of which has a monopoly within the territory assigned to it (III Tr. 142); with electric companies, which have a monopoly on the provision of electricity within the particular territory (III Tr. 145-146); and with the telephone industry where there is monopoly within the service territory and where one company owns about 85% of the telephones in the State (III Tr. 156).

Such factors as these cause railroads to have a much greater risk as investments than is the case with public utilities (II Tr. 85), thus further differentiating them from public utilities.

The receipt of substantial benefits and subsidies from the government is no longer limited to the railroad industry, as was alleged many years ago when classification of railroads was being upheld. Fran-

chises and special benefits are pervasive throughout the commercial and industrial field. For example, radio stations and television stations in Tennessee are classified as commerical and industrial property for purposes of ad valorem taxation (Appendix C); yet they possess exclusive franchises with respect to certain channels of communication. Tennessee offers many benefits, advantages and subsidies to non-railroad industries generally to induce them to locate within the State. An example is found in the availability of tax-free financing for the construction of plants on land acquired for the industry at public expense, often through the use of the public power of eminent domain. Lower interest rates available to governmental agency borrowers redound to the benefit of the industry through reduced rental payments. The result is a substantial cost saving to private industry, financed by the public in the form of higher taxes on other property to offset the lower taxes or tax-free situation of the new industry (III Tr. 168-170).

The power of eminent domain is available to a great variety of industrial and commercial enterprises (Frye, 5-6). Through the use of the power, downtown areas have been acquired by governmental corporations, cleared, and sold to private commercial and industrial firms. Usually the private purchaser would have been unable to acquire the property, and certainly not at the price available to the public agency through the power of eminent domain. The practical result is the same as if the power of eminent domain had been possessed by the ordinary industrial or com-

mercial establishment. It has benefitted directly from the ouster of the previous owner and the taking of his property.

The era when railroads were generators of large streams of income has long since vanished. Railroads, as a whole, have not earned as much as 4% on net investments since 1955 (I Tr. 12). A study of some 45 industries showed that the railroads earned the lowest return of all, 2.9% in 1972 and 3.5% in 1973 (II Tr. 78). Thus, railroads are the least able to bear excessive burdens of government which, in another time, were justified as being imposed upon railroads because of their productivity and of their alleged ability to bear a disproportionate part of the burden of government.

An argument advanced for classification of railroads for disproportionate ad valorem taxation has been that they allegedly are relatively great burdens upon society. But the record demonstrates, for example, the relatively low pollution by railroads as compared with other sources. For instance, railroads produce 0.5% of particulates placed in the air, while non-transportation industrial sources place 87.5% in the air (II Tr. 5).

Railroads are energy-conserving, moving three times as much freight per gallon of fuel as do big trucks (Frye, 33), and their safety record as a carrier of passengers far surpasses that of other modes of transportation (II Tr. 4-5) . The land area consumed by highways is many times that used by the railroads, and railroads are not a depletive industry producing from a non-replenishable source.

Through Witness Frye, Appellant showed that the evidence applied not only to the railroad industry in general but also to Appellant, in particular, in Tennessee.

The record below establishes the absence of any correlation between the characteristics of railroads, including Appellant, their position in the economy and society, and the extraordinary burden placed upon them by virtue of the action of the Tennessee legislature. It shows that in the significant respects, the characteristics of railroads are those of non-utility industrial and commercial concerns and not those of public utilities which, for example, possess effective monopolies and the near-guaranteed rates of return which result from such a monopoly. Railroads no longer possess those "distinctive characteristics and functions" which must be found to exist before classification may be sustained. *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573 (1938).

THE QUESTIONS ARE SUBSTANTIAL

Appellant brought this suit to contest action of the Tennessee legislature and of the assessing bodies in classifying properties of Appellant and other railroads in Tennessee with public utilities, rather than with other commercial and industrial properties, for the purpose of ad valorem taxation. The practical result of the legislature's action is to cause the real property of Appellant in Tennessee to be taxed at a level 37.5% greater than the level at which the real property of

non-railroad, non-public utility industrial and commercial concerns in Tennessee is taxed, and at an even greater disproportion in respect of personal property.

The case is of national significance. Appellant challenges here a practice which extends throughout the United States. Appellant believes that every major railroad in the country operates in more than one state which discriminates against railroads in its ad valorem tax system. The Senate Committee on Commerce concluded in 1972 that the discrimination amounted to at least $54 million in 1970. SENATE COMMITTEE ON COMMERCE, DISCRIMINATORY STATE TAXATION OF INTERSTATE CARRIERS, S. Rep. No. 92-1085, 92d Cong., 2d Sess. (1972).

This challenge is brought after years of change in the economic position of the railroads, culminating in the current situation of railroad bankruptcies in the Northeast and Midwest. One of the economist witnesses in this proceeding listed three factors which, in his opinion, are responsible for the financial decline of railroads. One of those factors was discriminatory state and local property taxation (II Tr. 98-99).

The record in this case demonstrates that there is no rational relationship between the characteristics and economic condition of Appellant and the object of the legislation complained of, namely, the proper distribution of the burden of taxation, to justify the classification of Appellant and the railroads for disproportionate property taxation.

Classification must "rest on real and not feigned differences . . . [T]he distinction [must] have some

relevance to the purpose for which the classification is made, and . . . the different treatments [must] be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters* v. *City of St. Louis,* 347 U. S. 231, 237 (1953).

Classification must be upon a reasonable ground, some difference which bears a just and proper relation to the attempted classification, and arbitrary selection can never be justified by calling it classification. *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150 (1897). All persons similarly circumstanced must be treated alike. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412 (1920).

This discriminatory taxation of railroad property has attracted the concern of successive Congresses and national administrations. Under both Presidents Nixon and Ford, legislative proposals have been made to forbid such discrimination. See, *e.g.,* Title II, H. R. 5385, 93rd Cong., 2d Sess. (1974); H. R. 12891, 93rd Cong., 2d Sess. (1974); S. 1876, 94th Cong., 1st Sess. (1975), and President Gerald Ford's Message to Congress sending the Railroad Revitalization Act, H. R. Doc. No. 94-155, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. H 4212 (daily ed. May 19, 1975), in which the matter of discriminatory state property taxation is specifically mentioned.

This case, therefore, involves questions of broad significance to the country as it undertakes to deal with multiple railroad reorganizations and with legislative proposals to prevent further deterioration within the industry.

An example of that significance may be seen in the fact that if federal loans or grants were made to railroads, as is presently being proposed, Congress would be, in effect, providing funds to make up for money discriminatorily and unconstitutionally (if Appellant is correct about the law) taken away by states and localities in the form of property taxes—money which, if not so unconstitutionally exacted, would have reduced or eliminated the need for federal assistance.

The conflict between congressional exercise of the commerce powers in furtherance of a National Transportation Policy and discriminatory state action in plain contradiction of that congressional purpose merits the analysis of this Court.

The case is additionally important because it presents questions of the proper application of Rule 52(a) of the Federal Rules of Civil Procedure, requiring findings of fact, and of earlier decisions of this Court exemplified by *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (1935).

The District Court's comments on the evidence are limited to a few lines:

> "At best, the Plaintiff's proof, although voluminous, tends to show only that railroads in general are not as profitable as before and that certain benefits and powers peculiar to them, such as the right of eminent domain, are not as useful or as used as they once were . . . Given the characteristics of railroads, it was of course eminently reasonable for the General Assembly to designate railroads as public utilities; and the economic condition of the railroad industry and its competition with others does not destroy such designation as being palpably arbitrary or invidiously discriminatory." (Appendix A, pp. 25-26)

The foregoing is the extent of the lower court's treatment of the evidence, which filled some 400 pages of typed depositions and well over 100 pages of written statements submitted as direct testimony.

In what ways the lower court believed railroads to resemble telephone, water, and electricity companies, those organizations most frequently springing to mind when one uses the words "public utilities"; what the court thought to be the characteristics of a public utility and what the characteristics of a non-public utility; in what ways the court thought railroads to resemble non-utility industrial and commercial concerns; what the court thought to be the governing characteristics for application of that reasonable discretion which the legislature must exercise in making its classifications; and whether the court decided that circumstances had not changed, or, though changed, did not establish invidious discrimination—these, and many other questions, are left without findings and unanswered.

Compliance with Rule 52(a) is mandatory. *Featherstone* v. *Barash,* 345 F. 2d 246 (10th Cir., 1965); *Woods Construction Co.* v. *Pool Construction Co.,* 314 F. 2d 405 (10th Cir., 1963); *Kweskin* v. *Finkelstein,* 223 F. 2d 677 (7th Cir., 1955). Yet the opinion of the court below is bereft of vital findings of fact, either subsidiary or ultimate. *O'Neill* v. *United States,* 411 F. 2d 139 (3rd Cir., 1969).

The question before the court below was one of fact, namely, have the characteristics of the railroads so changed in the years since the inception of their being treated separately or as public utilities for property tax classification purposes as to make it unreasonable to continue so to characterize and treat them rather than as other commercial and industrial enterprises? The precedents holding that reasonable classifications by the legislature will be sustained necessarily turned upon their facts. The burden which Appellant assumed in undertaking to show that present facts are sufficient to dictate a departure from the decisions upholding such discriminatory classifications is a substantial one and makes doubly important the fulfillment by the lower court of its duty of finding the facts. Judge Frank's comments in *United States* v. *Forness,* 125 F. 2d 928 (2nd Cir., 1942), at p. 942 are apposite:

> "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper."

To support conclusory determinations, ". . . there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated." *Kelley* v. *Everglades Drainage District,* 319 U. S. 415, 420 (1943). "A conclusion of ultimate fact without any subsidiary or basic findings of fact upon which such conclusion is based is insufficient compliance with Rule 52(a)." *Woods Construction Co.* v. *Pool Construction Co.,* 314 F. 2d 405, 406 (10th Cir., 1963).

"Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. . . . Otherwise, their findings are useless for appellate purposes." *Dalehite* v. *United States,* 346 U. S. 15, 24, n. 8.

It is not the function of the reviewing court to pore over the record below to answer questions such as those mentioned above, *Kelley* v. *Everglades Drainage District,* 319 U. S. 415, 421-422 (1943); *B. F. Goodrich Co.* v. *Rubber Latex Products, Inc.,* 400 F. 2d 401 (6th Cir., 1968); *Woods Construction Co.* v. *Pool Construction Co.,* 314 F. 2d 405 (10th Cir., 1963), and cases cited therein. That is the function of the trial court.

The purpose of Rule 52(a) is threefold—findings of fact are an aid to the trial court's process of adjudication and evoke care in that process; they make definite what is decided in order to apply the doctrines of *res judicata* and estoppel; and they are an aid to the appellate court on review. *Featherstone* v. *Barash,* 345 F. 2d 246 (10th Cir., 1965); 5A Moore's Federal Practice 2706, ¶ 52.06[1]; Rule 52, Fed. R. Civ. P., Notes of Advisory Committee.

None of these purposes has been served in this case. Appellant believes that proper disposition of this case rests upon a careful, thoughtful and almost "clean-slate" analysis and exposition of facts as they exist today, comparing them with facts which existed 40 and 50 years ago. Such process can only be the slow and deliberate one of finding just what the facts of today are and of comparing them with yesterday's facts. Yet the opinion below has none of those findings of facts which would have resulted from this vital process.

The opinion below is, with all respect to the court below, of no significant value in respect of *res judicata* and estoppel by judgment. There being no findings of fact, it cannot be known in the future whether other like contests can be progressed or not.

Lastly, the Supreme Court, which is the first and last level of review in this instance, is confronted with no findings to aid it in its process of review, no findings which suggest to it the process by which the trial court reached its conclusions as to the impact of the evidence. The Supreme Court has said that it is particularly important that the trial court find the facts when there is a direct appeal to the Supreme Court:

> ". . . [Findings of fact are] an essential aid to the appellate court in reviewing an equity case [citations omitted] and compliance with the rule is particularly important in an anti-trust case which comes to this Court by direct appeal from the trial court."
>
> *Interstate Circuit, Inc.* v. *U. S.,* 304 U. S. 55, 56-57 (1938).

Lastly, Appellant believes that the opinion below represents a misconception of the breadth of the court's reach. In saying that—

> "[T]he Plaintiff's case is one for the legislature, and its economic arguments are more appropriately addressed to that body, for to grant the relief requested in this case would take the Court outside the narrow confines of judicial review and would, in effect, substitute its judgment for that of the Tennessee General Assembly" (Appendix A, p. 26),

the court below ignored the rule that changed conditions may render invalid that which once was valid and that in such circumstances the court may intervene to protect against arbitrary or unreasonable action and deprivation of constitutional rights. *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405 (1935). In essence,

its position seems to be that legislative rejection of economic arguments, in enacting legislation, cannot raise constitutional objections reviewable in the courts. This is clearly erroneous.

The similarity of that case to the present one is striking. Plaintiff there alleged that changed conditions made invalid a statute valid when enacted, 294 U. S. at 414; Appellant alleges that changed conditions make invalid the application to it of precedents decided in quite different factual contexts. The Tennessee Supreme Court in *Walters* had held the questioned statute constitutional upon its face, 294 U. S at 414; the lower court in this case found the Tennessee classification scheme in the state constitution and the legislative determination as to the classification of railroads as public utilities "not unconstitutional on its face" (Appendix A, p. 24). The Tennessee Supreme Court in *Walters* found that it could not then decide whether "changed economic and transportation conditions" rendered the act burdensome or unreasonable, 294 U. S. at 414; the court below said that Appellant's evidence of changed economic and transportation conditions must be addressed to the legislature and for the court to act upon them would take the court beyond its proper role (Appendix A, p. 26).

Of the understanding of the Tennessee Supreme Court, this Court said, in *Walters:* "A rule to the contrary is settled by the decisions of this court," 294 U. S. at 415, and that unless the evidence were of such a nature that it "could not conceivably establish" that the State's action complained of was arbitrary and unreasonable, there was error in refusing to consider the evidence. 294 U. S. at 215-216. The case was remanded for further proceedings below. Such a disposition would be appropriate in this case. The evidence in the record is of too great a volume and too high a quality for it to be said that it "could not conceivably establish" that Tennessee's action in classifying Appellant was arbitrary and unreasonable.

CONCLUSION

It is evident from the above that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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